

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>WELDON EUGENE AARON, III</b>	)	
Claimant	)	
VS.	)	
	)	
<b>INTERSTATE WRECKER, INC.</b>	)	Docket No. 1,026,882
Respondent	)	
AND	)	
	)	
<b>TRAVELERS INDEMNITY COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals the March 10, 2005 [sic]<sup>1</sup> preliminary hearing Order of Special Administrative Law Judge (SALJ) Vincent L. Bogart. Claimant was awarded benefits after the SALJ found a temporary aggravation of claimant's preexisting back condition. Benefits in the form of temporary total disability and ongoing medical care were ordered provided by respondent. Respondent was also ordered to provide employment records sufficient to determine claimant's average weekly wage.<sup>2</sup>

**ISSUES**

1. Did claimant suffer an accidental injury which arose out of and in the course of his employment with respondent?
2. Did claimant provide timely notice of his accident?

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<sup>1</sup> In the Order, the date of the Order is stated as March 10, 2005. This appears to be a typographical error, since the hearing was held February 28, 2006, and the Order came out approximately two weeks later, so the date would have to have been March 10, 2006.

<sup>2</sup> K.A.R. 51-3-8(c).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the SALJ should be reversed.

Claimant started working for respondent as a tow truck driver on July 22, 2005. He alleges injury to his low back due to the bouncing of the truck, which claimant alleges was poorly maintained. Respondent contends claimant failed to provide timely notice of the alleged injuries. The dispute hinges to a great deal on claimant's testimony and credibility. Claimant's description of the accident is basically uncontradicted in this record.

Claimant had undergone back surgery approximately 15 years before, when Dr. Stein and Robert L. Eyster, M.D., performed a fusion on claimant at L4-5 and L5-S1. A second procedure, performed in approximately 2000 or 2001, was necessitated by claimant's ongoing problems and resulted in rods being installed at the level of claimant's prior surgery. This information was not known to respondent at the time of claimant's hire. Dr. Eyster, in his report of January 30, 2006, noted that claimant's problems had been present for some time. He noted claimant had similar complaints on November 16, 2004, when he examined claimant.

Claimant alleges he told respondent's owner, Kevin Williams, of the back pain and need for medical treatment, but was refused. This notice was originally reported to have occurred on approximately October 24, 2005.<sup>3</sup> However, on cross-examination, claimant testified the notice to Mr. Williams occurred after his examination with Dr. Eyster on November 16, 2005, and the subsequent MRI done on November 29, 2005.<sup>4</sup> Mr. Williams testified that he was not notified about claimant's alleged problems until approximately one to one and a half months after claimant last worked for respondent. Claimant last worked for respondent sometime between approximately October 28 and November 1, 2005.<sup>5</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>6</sup>

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<sup>3</sup> P.H. Trans. at 7-8.

<sup>4</sup> P.H. Trans. at 30-32.

<sup>5</sup> In respondent's brief, it says between October 28 and November 1 (Respondent's Brief at 3). Claimant testified that the last time he worked was October 28, 2005, or the first week of November (P.H. Trans. at 48); claimant stated that the last day he worked was either late October or early November (P.H. Trans. at 14); claimant stated that he thinks it was the first week of November (P.H. Trans. at 27).

<sup>6</sup> K.S.A. 2005 Supp. 44-501(a).

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.<sup>7</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>8</sup>

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.<sup>9</sup>

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that particular case.<sup>10</sup>

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.<sup>11</sup>

An accidental injury is compensable even where the accident serves only to aggravate a preexisting condition.<sup>12</sup>

Claimant's testimony regarding the accident is basically uncontradicted in this record. No representative of respondent testified to the condition of the trucks except Mr. Williams, who verified that claimant's truck had a steering mechanism problem which was fixed. Additionally, Dr. Eyster, in his report of January 30, 2006, stated "[a]s far as I am concerned, the injury that is being claimed in October 2005 would have been an

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<sup>7</sup> K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

<sup>8</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>9</sup> *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

<sup>10</sup> *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, rev. denied 235 Kan. 1042 (1984).

<sup>11</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

<sup>12</sup> *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

aggravation of a pre-existing condition.”<sup>13</sup> The Board finds, for preliminary hearing purposes, that claimant has proven that he suffered accidental injury arising out of and in the course of his employment.

K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.

K.S.A. 44-520 goes on to say:

The ten-day notice provision provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident . . . .

Claimant alleges he notified Mr. Williams of his problems on October 24, 2005. However, on cross-examination, claimant acknowledges the notice to Mr. Williams came after his examination by Dr. Eyster on November 16, 2005, and the subsequent MRI on November 29, 2005. Neither date is within 10 days of claimant’s last day with respondent, whether that day be October 28 or November 1 or somewhere in between. Claimant does argue that after he notified Mr. Williams of the alleged accident and need for medical treatment, he was rebuffed and told to “quit being a baby.”<sup>14</sup> However, even this conversation may have occurred after the MRI.<sup>15</sup> The Board cannot find, from this record, that claimant gave respondent timely notice of accident, nor that claimant has proven just cause for this failure. The Board, therefore, reverses the SALJ’s award of benefits in this matter.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order of Special Administrative Law Judge Vincent L. Bogart dated March 10, 2006, should be, and is hereby, reversed.

**IT IS SO ORDERED.**

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<sup>13</sup> P.H. Trans., Cl. Ex. 2.

<sup>14</sup> P.H. Trans. at 12.

<sup>15</sup> P.H. Trans. at 30-32.

Dated this \_\_\_\_ day of May, 2006.

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BOARD MEMBER

c: Tamara J. Collins, Attorney for Claimant  
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier  
Vincent L. Bogart, Special Administrative Law Judge  
Nelsonna Potts Barnes, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director